

Pratap v. Gonzales, No. 04-71492

JUL 10 2006

O'SCANNLAIN, Circuit Judge, dissenting:

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

While I agree with the majority that we should remand for reconsideration of Pratap's claim under the Convention Against Torture ("CAT"), I dissent from its holding that the adverse credibility determination made by the Board of Immigration Appeals ("BIA") was not supported by substantial evidence.

I

The BIA relied on three apparent discrepancies between Pratap's statements to the asylum officer and her testimony before the immigration judge ("IJ"). While I think this a close case, at least two of the discrepancies are significant and go to the heart of Pratap's claim of persecution. Thus, I would uphold the BIA's decision.

A

First, the inconsistency regarding the date of the attempted rape provides substantial evidence for the BIA's decision. The only date Pratap mentioned to the asylum officer was April 1998, and yet in her testimony before the IJ Pratap stated that an attempted rape occurred in January 1999. The family fled from their home in August 1999.

Although we have held that minor inconsistencies do not constitute

substantial evidence for an adverse credibility determination, we had in mind inconsistencies such as a petitioner's failure to remember the company name he claimed on his visa application. *See Guo v. Ashcroft*, 361 F.3d 1194, 1201 (9th Cir. 2004); *see also Chen v. INS*, 266 F.3d 1094 (9th Cir. 2001) (overturning an adverse credibility determination based on an inconsistency between two birth certificates which were submitted only to determine whether the petitioner should be detained as an adult or a minor), *rev'd on other grounds* 537 U.S. 1016 (2002). In contrast, inconsistencies go to the heart of an asylum claim if they can "be viewed as attempts by the applicant to enhance h[er] claims of persecution." *Quan v. Gonzales*, 428 F.3d 883, 887 (9th Cir. 2005) (citations and internal quotation marks omitted); *accord Singh v. Ashcroft*, 362 F.3d 1164, 1171 (9th Cir. 2004) (same).

In this case, the date of the attempted rape is important. If the attempted rape occurred in April 1998, the petitioner and her family remained in Fiji *without being harmed* for another year and four months. If the date was in January 1999, they remained for only seven months. The date therefore could have had a substantial impact on Pratap's ability to show a well-founded fear of future persecution and, perhaps, on the government's ability to show changed circumstances to rebut such claimed fear. *See Lata v. INS*, 204 F.3d 1241, 1245

(9th Cir. 2000) (“[T]his incident, if it did occur, did so in 1990, but Lata did not leave Fiji until May 16, 1992. In that time, Lata was never again troubled by these or any other native Fijian youths.”). The date is not related to some peripheral matter, but is the date of the very events that form the basis for this asylum claim. I disagree with the majority’s assertion that “[t]he heart of Pratap’s asylum claim is not *when* her landlord attempted to rape her, but *that* he attempted it, and why.” Pratap’s moving forward the date of the attempted rape enhances somewhat her claim to asylum, and it is therefore an adequate basis for the adverse credibility determination.

B

Second, I would uphold the BIA’s adverse credibility determination on the basis of inconsistencies regarding Pratap’s injuries. Before the asylum officer, Pratap stated that the glass bottle thrown by an assailant did not cut her foot. Then, before the IJ, Pratap testified that the bottle caused “a big injury” and that her foot was “profusely bleeding.” In fact, she said she had been “hit so badly that [she] was not able to do anything.”

This is a substantial inconsistency. The event at issue appears far more violent if Pratap ended up with a debilitating laceration on her foot, rather than merely having been hit on the foot with no apparent effect. The inconsistency goes

to the heart of the asylum claim, as it should be seen as an attempt by Pratap to enhance the evidentiary basis for her alleged well-founded fear of persecution. It is clearly akin to the discrepancies we have previously deemed adequate to support an adverse credibility determination. *See Malhi v. INS*, 336 F.3d 989, 993 (9th Cir. 2003) (involving “geographic discrepancies which went to the heart” of petitioner’s claim); *Chebchoub v. INS*, 257 F.3d 1038, 1043 (9th Cir. 2001) (involving inconsistencies relating to “the events leading up to his departure and the number of times he was arrested”); *de Leon-Barrios v. INS*, 116 F.3d 391, 393–94 (9th Cir. 1997) (“The discrepancies between de Leon’s two applications, however, are not minor. Instead, the discrepancies relate to the basis for his alleged fear of persecution.”).

I do not agree with the majority’s reasoning that “the important point is that [Pratap] was attacked at all.” Not all attacks are created equal, and Pratap’s testimony that her foot bled “profusely” was clearly an attempt to enhance her claim. A severe injury is more likely than a minor one to establish past persecution or a well-founded fear of future persecution.

II

For the foregoing reasons, I respectfully dissent in part. I would remand on the CAT claim, but not the claims of asylum and withholding of removal.